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PROHIBITION : CONSTITUTIONAL POSITION REGARDING.

BY

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Of late, there has been a spate of pronouncements and writings from diverse sources regarding the validity of scrapping prohibition, and the object of the present note is to present the data on the subject and sum up the *pros* and *cons* of the question, which it may be pointed out, are so nicely balanced that it is somewhat difficult to be dogmatic about the conclusion which can reasonably be reached therefrom.

To appreciate the controversy in its true perspective, it is necessary to some extent to go into the history of the matter. As settled by the Constituent Assembly, Part IV, of the Constitution of India (1950) is headed '*Directive Principles of State Policy*' and Article 36 lays down that

"In this Part, unless the context otherwise requires, 'the State'. has the same meaning as in Part III".

That is 'State' includes Parliament, State Legislatures, Union and State Governments and Local authorities, etc. Article 37 says:

"The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

Article 47 lays down that the State shall regard the raising of the level of nutrition, etc., as among its primary duties and goes on to say that

"in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health."

One has to go back to the Supplementary Report of the Advisory Committee on the subject of Fundamental Rights (presided over by Sardar Patel and presented on 30th August, 1947) to locate the source of the present articles. The heading of the part in that Report was 'Fundamental Principles of Governance', and Article 1 of the Report laid down that the

"principles of policy set forth in this part are intended for the guidance of the State, while these principles are not cognisable by any Court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State".

Article 10 of the Report dealing with nutrition, contains no reference to the prohibition of the consumption of intoxicating drinks. In the Draft Constitution the present Article 37 was Article 29 and Article 47 was Article 38. The heading of the Report had been changed into the present heading, as also the phraseology of Article 1 of the Report so as to conform to the phraseology of present Article 37. The rider as to prohibition was added to Article 38 (in the draft) during the discussion of that Article by the Constituent Assembly.

Because these principles are not justiciable, the argument has been advanced that they can be disregarded with impunity by a Legislature in enacting laws. Whether this is the true position can only be answered with reference to the pronouncements of important members of the Drafting Committee in the Constituent

UNIVERSITY DEPARTMENT OF LAW NOT TO BE REMOVED

Assembly during the discussion on Article 28 (present Article 36). Dr. Ambedkar pointed out that it was the intention of the Constituent Assembly that in future both the Legislature and the Executive should not merely pay lip service to these principles but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country. Mr. Alladi Krishnaswami Ayyar said on the 23rd November, 1949, in the Constituent Assembly :

> " Having regard to the wide nature of the subjects dealt with in these articles and the obvious difficulty in making the subjects dealt with by these articles justiciable, they have been classed as directive principles of state policy. . . . . . No ministry responsible to the people can afford lightheartedly to ignore the provisions in Part IV of the Constitution."

The Supreme Court in *The State of Madras* v. *Champakam Dorairajan*[1] while concerned with the somewhat different though cognate question as to whether directive principles can override the provisions of Part III have remarked that so long as there is no infringement of fundamental rights there can be no objection to the State acting in accordance with the directive principles. This language is not capable of the interpretation that laws violating directive principles are invalid. In view of the above pronouncement of the highest tribunal the views of Somasundaram, J., in *Champakam Dorairajan* v. *The State of Madras*[2] and of Kapur and Falshaw, JJ., in *Om Parkash* v. *State*[3], that the articles in Part III must be read with the directive principles, assume a subsidiary and academic importance. Viswanatha Sastri, J. in *Champakam Dorairajan* v. *The State of Madras*[2], opines that discrimination which is prohibited by Part III cannot be admitted by the backdoor of Part IV. The absence of an article similar to Article 13 (which invalidates laws violating Part III) in Part IV, and the language of Article 37 with its reference to the ' duty ' and not ' obligation' of the State to make laws consistent with Part IV, militate against the invalidation of laws offending Part IV. But the question arises, if Part IV made no difference to the validity of laws encted in defiance of the principles contained therein, what was the object in enacting Part IV ? This is a somewhat difficult question to answer and one can only guess the intention of the Drafting Committee in putting Part IV from the circumstances under which the Constitution was framed. Having regard to entry 8 of List II (intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors), entry 19 of list III (drugs and poisons), entry 51 list II (duties of excise on alcoholic liquors for human consumption manufactured in the State) and Article 246 dealing with the subject-matter of laws made by Parliament and State Legislatures, the validity of liquor excise legislation would appear to be beyond doubt. Having regard to Article 372 which deals with continuance of existing laws it would appear that repeal of prohibition laws could be brought about by the competent Legislature contemplated by that Article. But as pointed out above, the crucial question still remains to be answered, what purpose does Part IV serve if it is nothing more than a charter of pious platitudes, or a leaf torn from a tome enshrining political manifestos ? To answer this question one must go to the very foundations on which our constitutional edifice has been reared and a reference to the Constitution of the United States of America thus becomes inevitable. The American Constitution is based on judicial supremacy, judicial veto, due process, and such cognate doctrines. Our Constitution has plumped for Parliamentary Supremacy and has no particular liking for American due process. The process of jettisoning American due process began with the enactment of Article 21 and culminated with *A. K. Gopalan* v. *The State of Madras*[4] where the Supreme Court was averse to converting itself into a third chamber of the Legislature. In my opinion, Part IV was intended by the Drafting Committee to be some sort of compensation for the omission of, and a substitute for, due process. While our Supreme Court was under the terms of our Constitution debarred from importing into the interpretation of the Constitution some fundamental principles which were

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1. 1951 S.C.J. 313 : (1951) 1 M.L.J. 621 (S.C.):
2. (1950) 2 M.L.J. 404 (F.B.).
3. A.I.R. (1951) Punj. 93.
4. (1950) S.C.J. 174 : 1950 S.C.R. 88 : (1950) 2 M.L.J. 42 (S.C.).

Acc. No. 7203/5
Date

above all laws the Drafting Committee was loath to conferment of judicial blessings on each and every law whose only merit was that it conformed to the Seventh Schedule. The principles of Part IV were to be pressed into aid in interpreting the Seventh Schedule and other portions of the Constitution and after paying due regard to administrative and financial considerations, balance of convenience, etc., laws not fitting into Part IV could be invalidated. That appears to me to be the meaning of the expressions ' strive ' (which occurs six times), ' take steps ', ' promote with special care ' etc., occurring in Part IV. Part IV therefore represents not the rigid, inexorable and merciless American due process under whose lash the law-making body cowers, but a kindly, flexible and discretionary due process which invalidates laws only when there is no other way out. Part IV is not the blue-print of any particular political party but enshrines a mixed political ideology which might aspire to some hopes of permanence notwithstanding violent fluctuations due to changes of party politics, and aims at continuity of legislation and legislative policies in spite of change of Governments and of the political complexions of Legislatures.

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It is not just therefore to describe Part IV as containing New Year resolutions (as it was described by Mr. Naziruddin Ahmed in the Constituent Assembly), or as being in the nature of a cheque on a bank payable when able, that is only if the resources of the bank permitted, which was the analogy suggested by Professor K.T. Shah. Part IV is intended to keep Legislatures on the right track without at the same time embarrassing them with tall and impracticable orders. The Courts are by the language (careful and well chosen and cautious) used in Part IV constituted the arbiters to decide the time, manner and pace of the wholesome objectives placed by the Constitution before the Legislature.

P2313

REVIVAL OF THE WIDOW'S POWER OF ADOPTION UNDER HINDU LAW

BY

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Certain observations of Justice Saryanarayanarao in the case of *Aravamudha Ayyangar* v. *Ramaswami Bhattar*[1], have been pointed out as being in conflict with the decision of the Privy Council in the case of *Amarendramansing* v. *Sanatansing*[2]. But the observations of the learned Judge of the Madras High Court are more in accordance with the genius of Hindu Law than the pronouncement of the Privy Council in *Amarendra's case*[2]. Justice Satyanarayanarao observed :

> " The full legal capacity to continue the line means continuance of the line in one of two ways, *i.e.*, either by leaving a natural or adopted son or a widow capable of bringing into existence a son by adoption. The test is to find out whether these conditions existed at the time of the son's death. If they did not exist the power did not terminate. If they existed the power came to an end and in certain circumstances, *e.g.*, if the son's widow dies without making an adoption, the mother's power may be revived. If the object of adoption is the religious one of perpetuating the line with a view to make a permanent arrangement for the administration of the spiritual wants of the deceased, the object is not acheived when the continuance of the line came to a standstill. There must be some power somewhere to continue the line, and if the person lower down dies without providing for the continuance of the line, the power of the person higher up revives and continues."

It is said that this theory of revival of power does not receive any countenance from the observations of the Privy Council in *Amarendra's case*[2]. But it is reiterated that this theory is in accordance with the genius of Hindu Law. It was held in *Amarendra's case*[2] that the power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow. It is argued that since the power is extinguished it can never be revived. But it may pertinently be asked whether the power is actually extinguished or only suspended. There is no text of Hindu Law which says that the power is extinguished and certain decisions of the Nagpur and Lucknow High Courts[3] support the theory of revival. When

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1. (1952) 1 M.L.J. 251.
2. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
3. *Bapuji Ramji* v. *Gangaram*, I.L.R. (1941) Nag. 178, *Prem Jagat Kuer* v. *Harihar Bakshising*, I.L.R. (1946) Luck. 1.

the son and his widow passed away without providing for the continuance of the line, the duty of providing for the continuance of the line by adoption is cast upon the mother. The mother's right of adoption is only suspended in the meantime and not extinguished. Moreover there is distress (*apat*) here in the form of the extinction of the family. Once the obstacle to the exercise of her right is removed the mother can adopt.

Sri K. R. Ramaswami Ayyangar in his essay—" Posthumous Adoption "—published in 1949 (2) M.L.J. at page 55 writes thus—

> " Since the power of the widow exhausts only when there is an adoption and that person beget a son or leaves a widow competent in the way of law to beget a child by adoption it may be necessary that this limitation should be there not only for the first time she adopts but during each time she has power to exercise the authority, the period of limitation starting from the date of revival of the power of the widow to adopt."

These observations presume the possibility of revival.

The power of the mother is never extinguished but only kept in abeyance by the presence of counter-circumstances. Moreover the son and his widow being dead there is no reason why the mother-widow should not adopt with the consent of the sapindas, because the son adopted by her is equally efficient in conferring spiritual benefit on ancestors as a son adopted by the son's widow. In this way the religious purpose of adoption also would be served. To take an example from the *Purvamimamsa*—when the *somalata* is not available *putika* can be substituted in its place. So also when the person primarily entitled to adopt is not available, the next rightful person may adopt. Such person's right is only kept in abeyance by the existence of the holder of a superior title but is not extinguished. As long as there is the daughter-in-law of course she would be primarily entitled to adopt. But when she is not in existence why should not the mother-widow be allowed to adopt with the consent of the sapindas ? Nandapandita in his *Dattakamimamsa* authorises a person, whose son is dead, to adopt. When the son and daughter-in-law have died without providing for the continuance of the line, the mother is left in the category contemplated by Nandapandita. Hence she is entitled to adopt. Thus the general principles of the law of adoption also support the theory of revival.

In *Amarendra's case*[1] itself the Privy Council warned

> " that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man ".

The widowed mother-in-law, bereft of her son and daughter-in-law, both of whom died without providing for the continuance of the line, is left precisely in the same position as is contemplated by the Privy Council.

The genius and spirit of Hindu Law of adoption is best expressed by Manu in the following verses :. The spiritual efficacy of a son is thus described :

क्षेत्रजादीन् सुतानेतानेकादशयथोदितान् ।
पुत्रप्रतिनिधीनाहुः क्रियालोपान्मनीषिणः ॥ (ch. 9. v. 180)

पुंनाम्नो नरकाद्यस्मात्त्रायते पितरं सुतः ।
तस्मात् पुत्रः इति प्रोक्तः स्वयमेवस्वयंभुवा ॥ (ch. 9. v. 138)

पुत्रेण लोकान् जयति पौत्रेणानन्त्यमश्नुते ।
अथ पुत्रस्य पौत्रेण ब्रध्नस्याप्नोति विष्टपम् ॥ (ch. 9. v. 137)

यस्मिन्नृणं संनयति येन चानंत्यमश्नुते ।
स एव धर्मजः पुत्रः कामजानितरान् विदुः ॥ (ch. 9. v. 107)

1. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 ; I.L.R. 12 Pat. 642 (P.C.),

In the case of the widowed mother, whose son and daughter-in-law died without leaving a son and without adopting, the essential condition of adoption, namely, the absence of a son who can confer spiritual benefit and perpetuate the lineage, is present. Hence it is but proper that she should adopt.

Even the great poet Kalidasa voices the spiritual efficacy of a son in his Raghuvamsa and Sakuntala thus :

नूनं मत्तः परं वंश्याः पिण्डविच्छेददर्शिनः ।
न प्रकामभुजश्राद्धे स्वधासंग्रहतत्पराः ॥ Raghuvamsa (1—66)
मत्परं दुर्लभं मत्वा नूनमावर्जितं मया ।
पयः पूर्वैः सनिश्वासैः कवोष्णमुपभुज्यते ॥ Raghuvamsa (1—67)
राजा—अहो ! दुष्यंतस्य संशयमारूढाः पिण्डभाजः ॥
अस्मात्परं बत यथाश्रुतिसंभृतानि
को नः कुले निवपनानि करिष्यतीति ।
नूनं प्रसूतिविकलेन मया प्रसिक्तम्
धौताश्रुशेषमुदकं पितरः पिबन्ति ॥ (Act 6—v 25 Sakuntala)

In the Bengal case of *Manikchand* v. *Jagatsettaini*[1] it was held that if the estate is once more vested in the mother, after the death of the son and his widow without issue, or adoption, her right of adoption revives. According to the custom obtaining among the Nattukottai Chetties of Madras the power to adopt does not come to an end, where the son has died leaving a widow. (*Subramaniam v. Somasundaram*[2]. So the custom and consciousness of the community also support the theory of revival.

The argument in *Amrendra's case*[3] that the father's duty or debt is discharged the moment the burden of continuing the line and solemnizing the rites is passed on to a new generation does not appear to be convincing. Because in such a case Nandapandita's dictum that one whose son is dead, may adopt, becomes meaningless. To say the least, such a father whose burden is passed on to a new generation may be delivered from the hell called *Put,* because he has seen the face of his son. But if such son and his widow die issueless and without adoption, are the other aims of adoption namely, the offering of the funeral cake and water, and the celebrity of the name, and the perpetuation of the lineage, fulfilled ? Hence the widowed mother can adopt with the consent of the sapindas. I may conclude that the observations of Justice Satyanarayanarao faithfully reflect the true spirit of the Hindu Law of Adoption.

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1. I.L.R. (1889) 17 Cal. 518.
2. (1937) 1 M.L.J. 60 : I.L.R. (1936) 59 Mad. 1064.
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).

MADRAS BUILDINGS LEASE AND RENT CONTROL ACT (XXV OF 1949), SECTION 7—A NOTE ON THE DEFAULT CLAUSE.

BY

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Section 7 (2) (i) of the Madras Buildings Lease and Rent Control Act (XXV of 1949) states that a landlord may apply to the Rent Controller for eviction of his tenant on the ground that the latter has not paid or tendered the rent due by him within 15 days after the expiry of the time fixed in the agreement or in the absence of an agreement by the last day of the next month. When a petition is presented under section 7 (2) (i) for default of arrears of rent if the tenant shows that the default in question is not wilful (because that is the only plea available) the Rent Controller may give a reasonable time not exceeding 15 days to pay or tender the rent due up to the date of such payment or tender. This is proviso to section 7 (2) (i) which is added by the Amending Act VIII of 1951. This is an important innovation. If the default alleged is wilful eviction will be ordered against the tenant. The Act is exhaustive and self-contained. The provisions of the Civil Procedure Code have no application. *Abdul Kadir Hadjiar* v. *A. K. Murthi*[1] ; *Devichand Mulchand* v. *Dhanraj Kantilal*[2]. There is a recent pronouncement of Ramaswami, J., on this point reported in *Fernandes* v. *Ranganayakulu Chetti*[3]. The term "wilful default" is not defined anywhere in the statute. Other Acts have to be looked into for ascertaining the meaning of the term wilful default. Under the 1946 Act there is no proviso to section 7 (2) (i).

Section 7-A is another novel provision which has a bearing on the matter. This applies not only to section 7 (2) (i) but equally to all grounds of eviction mentioned in section 7. It states that when a petition is presented under section 7 by the landlord, the tenant has no right to contest the application or to prefer any appeal unless he pays or deposits with the controller or the appelate authority all arrears of rent due up to the date of payment or deposit in respect of the building and continues to pay or deposit any rent which may subsequently become due. When the tenant pays or deposits all the arrears of rent the petition or appeal as the case may be has to be heard and disposed of on merits. If the controller finds that there is wilful default proviso to section 7 (2) (i) comes into play. On the other hand if he fails to pay or deposit the arrears of rent eviction follows under section 7-A (4) in the absence of sufficient cause. Section 7-A was held to be applicable to appeals also and the appellate Court has power to condone the default. *Aravamudhu Chettiar* v. *Abdul Khader Rowther*[4]. (Govinda Menon, J.)

When there is any dispute as to the quantum of rent to be paid or deposited the controller has power to determine the same summarily [section 7-A (3)]. If the arrears of rent are not deposited with the controller as directed by him and an appeal is preferred and when there is a dispute as to the amount of the rent it is doubtful whether the appellate authority can exercise the power under section 7-A (3) in view of the omission of the words "Appellate Authority" in section 7-A (3).

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1. (1947) 2 M.L.J. 482.
2. (1948) 1 M.L.J. 276.
3. (1952) 2 M.L.J. 445.
4. (1952) 2 M.L.J. 492.